No. 87-1241 (5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

UNION GAS COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, GEORGIA, ILLINOIS, INDIANA, IOWA, KENTUCKY, MARYLAND, MINNESOTA, MISSOURI, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, UTAH, VERMONT, WEST VIRGINIA, and WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ROBERT ABRAMS
Attorney General of the State of New York
O. PETER SHERWOOD
Solicitor General
ELAINE GAIL SUCHMAN*
Assistant Attorney General
Environmental Protection Bureau
120 Broadway
New York, New York 10271
(212) 341-2458

* *Counsel of Record*

(Cover continued within)

29pp

JOHN K. VAN DEKAMP
Attorney General of the State of California
CLIFFORD L. RECHTSCHAFFEN
J. MATTHEW RODRIQUEZ
Deputy Attorneys General
350 McAllister St., Rm. 6000
San Francisco, CA 94102
(415) 557-8969

JOSEPH I. LIEBERMAN
Attorney General of the State of Connecticut
KENNETH N. TEDFORD
Assistant Attorney General
State Office Building
Room 147
Hartford, CT 06106
(203) 566-7213

MICHAEL BOWERS
Attorney General of the State of Georgia
BARBARA H. GALLO
Assistant Attorney General
132 State Judicial Bldg.
Atlanta, GA 30334
(404) 656-7273

NEIL F. HARTIGAN
Attorney General of the State of Illinois
ROSALYN KAPLAN
Chief, Civil Appeals Division
100 West Randolph, 12th Fl.
Chicago, IL 60601
(312) 917-3698

LINLEY E. PEARSON
Attorney General of the State of Indiana
HARRY JOHN WATSON, III
Chief Counsel
219 State House
Indianapolis, IN 46204
(317) 232-5666

THOMAS J. MILLER
Attorney General of the State of Iowa
JOHN P. SARCONE
Assistant Attorney General
Hoover Building, 2nd Fl.
Des Moines, IA 50319
(515) 281-5351

ARTHUR L. WILLIAMS
Acting General Counsel
DENNIS J. CONNIFF
Attorney Chief
Kentucky Natural Resources and Environmental Protection Cabinet
Capitol Plaza Tower, 5th Floor
Frankfort, KY 40601
(502) 564-5576

J. JOSEPH CURRAN, JR.
Attorney General of the State of Maryland
ANDREW H. BAIDA
RICHARD M. HALL
MICHAEL C. POWELL
Assistant Attorneys General
300 W. Preston Street
Baltimore, MD 21201
(301) 225-1846

HUBERT H. HUMPHREY, III
Attorney General of the State of Minnesota
JOHN R. TUNHEIM
Chief Deputy Attorney General
102 State Capitol
St. Paul, MN 55155
(612) 296-6196

WILLIAM L. WEBSTER
Attorney General of the State of Missouri
SHELLEY A. WOODS
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
(314) 751-8811

W. CARY EDWARDS
Attorney General of the State of New Jersey
JOHN J. MAIORANA
Deputy Attorney General
Richard J. Hughes Justice Complex
7th Floor CN114
Trenton, NJ 08625
(609) 292-8359

HAL STRATTON
Attorney General of the State of New Mexico
ALICIA MASON
Assistant Attorney General
P.O. Box 1508
Santa Fe, NM 87504
(505) 827-6030

LACY H. THORNBURG
Attorney General of the State of North Carolina
GAYL M. MANTHEI
Assistant Attorney General
P.O. Box 629
Raleigh, NC 27602
(919) 733-4618

ROBERT H. HENRY
Attorney General of the State of Oklahoma
SARA J. DRAKE
Assistant Attorney General
State Capitol, Rm. 112
Oklahoma City, OK 73105
(405) 521-3921

T. TRAVIS MEDLOCK
Attorney General of the State of South Carolina
WALTON J. MCLEOD, III
General Counsel
JACQUELYN S. DICKMAN
Assistant General Counsel
South Carolina Dept. of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201
(803) 734-4910

W. J. MICHAEL CODY
Attorney General of the State of Tennessee
MICHAEL W. CATALANO
Deputy Attorney General
450 James Robertson Pkwy.
Nashville, TN 37219
(615) 741-3499

DAVID L. WILKINSON
Attorney General of the State of Utah
FRED G. NELSON
Assistant Attorney General
State Capitol Building
Room 124
Salt Lake City, UT 84114
(801) 538-1017

JEFFREY L. AMESTOY
Attorney General of the State of Vermont
CONRAD W. SMITH
Assistant Attorney General
109 State Street
Montpelier, VT 05602
(802) 828-3171

CHARLES G. BROWN
Attorney General of the State of West Virginia
C. WILLIAM ULLRICH
First Deputy Attorney General
State Capitol Building
Charleston, WV 25305
(304) 348-2021

DONALD J. HANAWAY
Attorney General for the State of Wisconsin
CHARLES D. HOORNSTRA
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707
(608) 266-9945

Attorneys for Amici Curiae

QUESTION PRESENTED

Whether Congress possesses the power to subject unconsenting states to private suits for monetary damages in federal court pursuant to the commerce clause of article I of the United States Constitution.

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INTEREST OF *AMICI CURIAE*

The *amici curiae* States of New York, California, Connecticut, Georgia, Illinois, Indiana, Iowa, Kentucky, Maryland, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Utah, Vermont, West Virginia, and Wisconsin, submit this brief in support of the

Commonwealth of Pennsylvania's request for reversal of the decision rendered by the United States Court of Appeals for the Third Circuit in *United States v. Union Gas Company*, 832 F.2d 1343 (3d Cir. 1987).

The court of appeals in *Union Gas* held that Congress, in enacting the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("Superfund Act"), 42 U.S.C. §9601 *et seq.* (1982), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1987), unilaterally abrogated the states' eleventh amendment immunity pursuant to its powers under the commerce clause of article I of the United States Constitution and, as such, authorized private Superfund suits against states in federal court. [1] The court of appeals made sweeping generalizations in its discussion of Congress' power to subject unconsenting states to private suits in federal court despite the prohibitions of the eleventh amendment. It removed virtually all limitations on such power, leaving Congress free to negate the protections reserved to the states under the eleventh amendment in any statute enacted pursuant to any provision of the Constitution. This holding, in effect, destroys the meaning and purpose of the eleventh amendment.

As the objects of a multitude of potential lawsuits in the Superfund area, as well as in other areas of essential state activity

[1] The court of appeals further held that the language of the Superfund Act, as amended, clearly expressed Congress' intent to abrogate the eleventh amendment. It is the position of *amici* that, irrespective of the authority under which Congress acted in the passage of the Superfund Act, the court erred in its construction of the statute and that the language does not satisfy the "clear language" rule established by *Employees of the Dept. of Public Health and Welfare v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 285 (1973), and strongly reaffirmed in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984)). *See* most recently *Welch v. Texas Department of Highways and Public Transportation*, 107 S. Ct. 2941, 2947-8 (1987). *Amici* support Petitioner's arguments presented in its brief that the language subject to review by this Court does not represent "an unequivocal expression that Congress intended to override Eleventh Amendment immunity." *Id.* at 2948. The language is intended only to define the extent of state liability to the federal government.

where federal regulation exists, the *amici* states have a substantial interest in the outcome of this case. The court of appeals has broadened the scope of state liability under the Superfund Act and expanded congressional authority to abrogate eleventh amendment immunity. The court, in doing so, has disregarded significant Supreme Court precedent concerning the role of the eleventh amendment in our federal system. The twenty-one *amici* states respectfully urge this Court to reverse the lower court's decision and to restore the protections provided by the eleventh amendment.

SUMMARY OF ARGUMENT

One of the basic tenets of the Constitution as evidenced by the comments of the Framers during the debates on ratification was that the states maintained their sovereignty within the context of the Constitution and the formation of the Republic. In particular, the states required protection from intrusion by a federal judiciary in matters which were considered within their sole province, such as suits by individuals against a state for monetary damages. This protection was intended by article III creating the jurisdiction of the federal judiciary. However, in 1793 when the Supreme Court misinterpreted the extent of federal jurisdiction, the eleventh amendment was swiftly ratified to restore the original meaning of the Constitution. *See Hans v. Louisiana*, 134 U.S. 1 (1890). Since that time, the vitality of eleventh amendment protection has been frequently and consistently reaffirmed and strengthened by this Court. *See* most recently *Welch v. Texas Department of Highways and Public Transportation*, 107 S. Ct. 2941 (1987).

The eleventh amendment provided unconsenting states with immunity from private suits in federal court. This fundamental protection was subsequently limited by ratification of the fourteenth amendment which clearly contemplates limitations on a state's power and authorizes Congress to enforce those limitations through appropriate legislation. This Court has therefore held that Congress may abrogate eleventh amendment immunity without consent of the states when acting pursuant to the fourteenth amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In reaching this decision, this Court considered the historical basis

for ratification of the fourteenth amendment and its relationship to the eleventh amendment. The Court's reconciliation of the two amendments furthered the purposes of both. An evaluation of the interrelationship between Congress' article I powers, such as the commerce power, and eleventh amendment protection does not lead to a conclusion similar to that in *Fitzpatrick*. Providing unlimited power to Congress to unilaterally abrogate eleventh amendment immunity would render the amendment virtually meaningless and ignore the importance of it in our federal system. Clearly, article I does not empower Congress to abrogate the eleventh amendment without consent of the states.

Consistent with the fundamental rule that states may not be subject to private suits in federal court outside the purview of the fourteenth amendment, this Court has always required the element of state consent where Congress has attempted to abrogate eleventh amendment immunity in enactments under article I. Indeed, the distinction between abrogation under article I and the fourteenth amendment is based upon the requirement under article I for some form of consent on the part of the states. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). Without such consent, any attempt under article I at congressional abrogation of a state's sovereign immunity is invalid.

ARGUMENT

CONGRESS MAY NOT ABROGATE ELEVENTH AMENDMENT IMMUNITY UNDER THE COMMERCE CLAUSE WITHOUT CONSENT OF THE STATES

It has long been a fundamental rule of jurisprudence that a state may not be sued without its consent. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984) (*Pennhurst II*). This Court has consistently reaffirmed that this concept of state sovereign immunity is embodied in the Constitution. *Hans v. Louisiana*, 134 U.S. 1 (1890); *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934); *Welch v. Texas Department of Highways and Public Transportation*, 107 S. Ct. 2941 (1987). Ratification of the Constitution by the several states did not

represent wholesale consent to suit in the federal courts. Indeed, the states retained a substantial measure of sovereignty in their acceptance of the federation. The Constitution likewise does not grant Congress authority to eliminate the immunity of the sovereign states without their consent, except to the extent that the fourteenth amendment imposes limitations on that immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

A. *The States Did Not Consent to Private Suits in Federal Court By Ratification of the Constitution*

Almost one hundred years ago, the Supreme Court, in *Hans v. Louisiana*, reviewed the comments of the Framers in their debates on ratification of the Constitution and concluded that "[a]ny such power as that of authorizing the federal judiciary to entertain suits by individuals against the States, had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst on its trial before the American people." 134 U.S. at 12. James Madison, discussing section 2 of article III at the Virginia Convention of 1788, expressed his view that creation of the new federal government would not deprive the states of their sovereign immunity from private suits: "It is not in the power of individuals to call any state into court. The only operation...[article III] can have is that, if a state should wish to bring a suit against a citizen [of another state], it must be brought before the federal court." 3 Elliot's Debates 533 (2d ed. 1866).[2]

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[2] Article III of the United States Constitution provides, in pertinent part:

> Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

(Footnote continued)

John Marshall similarly interpreted section 2 of article III as conferring federal jurisdiction only in cases where a state would be a plaintiff in an action against citizens of other states:

> I hope that no gentleman will think that a State will be called at the bar of the federal court.... It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant – if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff.

3 Elliot's Debates 555-6 (2d. ed. 1866).[3]

Finally, Alexander Hamilton observed that section 2 of article III would not confer jurisdiction in a private suit against an unconsenting state:

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[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction....

U.S. Const., art. III, §2, cl. 1 and cl. 2.

[3] The language of art. III, §2, cl. 2 states that the Supreme Court shall have jurisdiction in all cases "in which a State shall be a Party," just as clause 1 extends federal jurisdiction "to Controversies to which the United States shall be a Party." *See* n. 2, *supra*. It has been clearly established that the language in clause 1 does not authorize suits against the United States without its consent in light of the doctrine of sovereign immunity. *See Williams v. United States*, 289 U.S. 553, 573 (1933). Similarly, the language in clause 2 concerning the states cannot be construed to override the states' sovereign immunity. Both clauses are to be interpreted to apply only to these parties as plaintiffs. *Monaco v. Mississippi*, 292 U.S. at 321.

> ...I shall take occasion to mention here, a supposition which has excited some alarm upon very mistaken grounds: It has been suggested that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities. A suggestion which the following considerations prove to be without foundation.
>
> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states....

The Federalist, No. 81, p. 548-9 (J. Cooke ed. 1961) (emphasis in original).[4]

When the Supreme Court in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), ignored the result intended by article III as presented by the Framers, the "reaction to *Chisholm* was swift and hostile." *Welch*, 107 S. Ct. at 2951. The eleventh amendment was quickly passed by Congress and ratified by the states to nullify the decision's effects. Although its words may appear limiting, in view of the original understanding of the Framers, this Court found that the eleventh amendment "embodies a broad constitutional principle of sovereign immunity." *Id.* at 2952. The eleventh amendment was found to extend to suits in federal court against a state brought by its own citizens, *see Hans v. Louisiana*, 134 U.S. at 15, suits in admiralty, *see Ex parte New York, No. 1*,

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[4] This Court noted in *Welch* that at the New York Convention, a declaration of understanding was appended to the resolution ratifying the Constitution indicating that "[']the Judical Power of the United States in cases in which a State may be a party, does not extend to criminal Prosecutions, or to authorize any Suit by any Party against a State.['] 2 Documentary History of the Constitution of the United States of America 194 (1894)." 107 S. Ct. at 2951, n. 14.

256 U.S. 490 (1921), and suits brought by foreign states, *see Monaco v. Mississippi*, 292 U.S. at 328-30. As Justice Marshall stated in his concurring opinion in *Employees of the Department of Public Health and Welfare v. Missouri Department of Public Health and Welfare*, 411 U.S. 279, 291-292 (1973):

> [D]espite the narrowness of the language of the Amendment, its spirit has consistently guided this Court in interpreting the reach of the federal judicial power generally, and ["]it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given...["] [citation omitted].

Furthermore, this Court noted in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238-9, n. 2 (1985) that its "Eleventh Amendment doctrine is necessary to support the view of the federal system held by the Framers of the Constitution.... The Framers believed that the States played a vital role in our system and that strong state governments were essential to serve as a 'counterpoise' to the power of the Federal Government.... The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself."

Ratification of article III did set forth the states' consent to suit in the federal judiciary under two limited circumstances. This Court, in *Monaco v. Mississippi*, explained those circumstances in which there was "a surrender of this immunity in the plan of the convention."[5] First, the states may sue other states in federal court because such a "scheme of arbitration...was essential to the peace of the Union." *Id.* at 328. Secondly, a state may be sued by the United States in federal court because it is "inherent in the constitutional plan." *Id.* at 329.

[5] Alexander Hamilton, The Federalist, No. 81, p. 549 (J. Cooke ed. 1961).

The Constitution, prior to the ratification of the fourteenth amendment, did not grant Congress the authority to affect the states' sovereignty with respect to private suits in federal court. As this Court stated in *Hans v. Louisiana*, the eleventh amendment "declared that the Constitution should not be construed to impart *any power to authorize the bringing of such suits.*" 134 U.S. at 11 (emphasis added).[6] As discussed below, the commerce clause in article I, §8, cl. 3 does not authorize Congress to negate eleventh amendment immunity without consent and only the fourteenth amendment provides such grant of power.

B. *The Eleventh Amendment Was Limited Upon Ratification of the Fourteenth Amendment*

Ratification of the fourteenth amendment after the Civil War represented an enlargement of Congress' power. *Ex parte Virginia*, 100 U.S. 339, 345-6 (1890). "The prohibitions of the Fourteenth Amendment are directed to the States and they are to a degree restrictions of State power." *Id.* at 346. Furthermore, Congress is specifically authorized in the text of the amendment to enforce the prohibitions contained therein. *See Katzenback v. Morgan*, 384 U.S. 641, 648 (1965).

When faced with construction of the eleventh amendment together with the fourteenth amendment, this Court found that the latter provided an exception to the fundamental rule that states may not be sued in federal court without their consent. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), held that, in recognition of the unique character of the fourteenth amendment, Congress when acting pursuant to section 5 of the fourteenth amendment may abrogate the eleventh amendment without the states' consent. By its terms, section 1 of the fourteenth amendment grants individuals certain protections as against the states. Section 5 specifically empowers Congress such that "[it] may, in determining what is [']appropriate legislation[']for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for

[6] The suit in *Hans v. Louisiana* was brought under an act of Congress conferring jurisdiction on the circuit courts. *See* 134 U.S. at 9.

private suits against States or state officials *which are constitutionally impermissible in other contexts*." *Id.* at 456 (emphasis added). Thus, the eleventh amendment is "necessarily limited by §5 of the Fourteenth Amendment." *Id.* at 456. *See also Atascadero*, 473 U.S. at 238; *Welch*, 107 S. Ct. at 2946.

Although the Constitution is not necessarily to be read strictly on a timeline, it cannot be ignored that the fourteenth amendment was ratified after and with full awareness of the eleventh amendment. As historical developments have evinced the need for change in this nation's Constitution, amendments have been ratified to effectuate the change. Just as the eleventh amendment is recognized as a limitation on article III jurisdiction, so too is the fourteenth amendment recognized as a limitation on eleventh amendment immunity. The lower court in *Fitzpatrick* stated that, "[t]o the extent that a tension exists between enforcement of rights under the Fourteenth and the state's immunity under the Eleventh, ...[the court's] duty...[was] to reconcile and give effect to both amendments insofar as possible." *Fitzpatrick v. Bitzer*, 519 F.2d 559, 569 (2d Cir. 1975).[7]

This Court has applied this historical balancing to the fifteenth amendment as well. In *City of Rome v. United States*, 446 U.S. 156 (1980), this Court suggested that section 2 of the fifteenth amendment also serves as a foundation for congressional power to abrogate the protection of the eleventh amendment:[8]

> We agree...that *Fitzpatrick* stands for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overriden by the power to enforce the Civil War Amendments ["]by appropriate legislation.["] Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. Applying this principle, we hold that Congress had the authority to regulate state and local voting. . . .

Id. at 179.

[7] The court of appeals in *Fitzpatrick* cited the case of *Prout v. Starr*, 188 U.S. 537 (1903), as establishing one of the Supreme Court's rules of constitutional construction. 519 F.2d at 569. This Court in *Prout* stated that "[t]he Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, *all of whose provisions are to be deemed of equal validity*." 188 U.S. at 543 (emphasis added). This suggests a balancing test whereby two seemingly conflicting constitutional provisions would be interpreted to give effect to the purposes of both provisions to the fullest extent possible.

[8] The fifteenth amendment (concerning right to vote) is structured in a fashion similar to that of the fourteenth. U.S. Const., amend. XV.

It can be seen from the Court's analysis in *Fitzpatrick* and *City of Rome* that those amendments passed subsequent to the eleventh amendment which clearly limit state sovereignty by their terms are also tailored to provide Congress with adequate authority to implement those limitations through use of the federal judiciary against unconsenting states. These amendments are very specific and when construed with the eleventh amendment still allow states substantial protection against private suits in federal court. Construing the commerce clause, however, as such a limitation on eleventh amendment immunity is inconsistent with our constitutional history and would drain the amendment of all content.

C. *The Commerce Clause Does Not Grant Power to Congress to Unilaterally Abrogate the Eleventh Amendment*

The court below held that Congress may abrogate unconsenting states' immunity by exercising its powers under the commerce clause or other plenary powers under article I. The court found that the states surrendered their sovereignty under article I by ratifying the Constitution. *Union Gas*, 832 F.2d at 1355.

Although the states gave up their ability to interfere with interstate commerce and to undertake certain other activities under article I "in order to form a more perfect union," as discussed above, it is clear from the statements of the Framers in conjunction with the ratification of the eleventh amendment that the states did not give their consent to private suits in federal court. The argument that the eleventh amendment merely limited the

power of the judiciary and not the power of Congress is untenable. The Constitution did not authorize Congress to extend the federal courts' jurisdiction to subjects which the courts were expressly prohibited from considering.

To construe the commerce clause, or any other clause under article I, as providing Congress unlimited power to abrogate eleventh amendment immunity not only ignores history but also violates the rules of constitutional construction and interpretation requiring reconciliation of the two provisions. *See Fitzpatrick*, *supra*, and *City of Rome*, *supra*. Adoption of such a construction would result in the total rejection of the principles of federalism.

While the reach of the commerce clause has expanded in many areas over recent years, it does not follow that there are *no* limits on the commerce clause power. In fact, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 547 (1985), which held that the tenth amendment provided little barrier to legislation validly enacted pursuant to the commerce clause, this Court recognized that the Constitution's federal structure imposed limitations on the commerce clause. *Id.*

The tenth amendment is a general reservation to the states of power "not delegated to the United States by the Constitution. . . ." U.S. Const., amend. X. The amendment was found to present no specific limitation on Congress' delegated powers. *Id.* at 557. In contrast, the eleventh amendment clearly enunciates a specific limitation on these delegated powers, *i.e.*, that Congress may not expand federal jurisdiction to include private suits against unconsenting states when legislating under these powers.[9] As Justice

[9] A significant number of lower courts have held that Congress may not subject an unconsenting state to suit in federal court under article I. *United States v. Freeman*, 680 F. Supp. 73 (W.D.N.Y. 1988) (specifically rejecting the court of appeals' decision in *Union Gas*); *Collins v. Alaska*, 823 F.2d 329, 332 (9th Cir. 1987); *Richard Anderson Photography v. Radford University*, 633 F. Supp. 1154, 1158 (W.D. Va. 1986) (article I copyright and patent clause); *Dunlop v. Minnesota*, 626 F. Supp. 1127, 1129 (D. Minn. 1986) (no abrogation where "plaintiffs offer no argument that the Social Security Act was passed under section

(Footnote continued)

Stevens has stated, "Congress may not, of course, transcend specific limitations on its exercise of the commerce power that are imposed by other provisions of the Constitution." *E.E.O.C. v. Wyoming*, 460 U.S. 226, 248 (1983) (Stevens, J., concurring).

In sum, "the most natural understanding of the Eleventh Amendment [is] that its central purpose was to reaffirm the principle—one that is not inconsistent with its 'common law' status—that the only legislatures with power to consent to suit in federal court are those of the states[.]" *Hart and Wechsler, The Federal Courts and The Federal System* at 231 (2nd ed.) (1981 Supp.). The fourteenth amendment and other similar post-eleventh amendment revisions to the Constitution are the only limitations on the states' immunity from suits by private citizens. There is no other source for extending article III judicial power in a suit by an individual against an unconsenting state.

5 of the Fourteenth Amendment"); *Mihalek Corp. v. State of Michigan*, 595 F. Supp. 903, 905-06 (E.D. Mich. 1984), *aff'd.*, 814 F.2d 290 (6th Cir. 1987) (article I copyright and patent clause); *Sanders v. Marquette Public Schools*, 561 F. Supp. 1361, 1372 (W.D. Mich. 1983) ("There is no showing that the [Federal Rehabilitation] Act was passed pursuant to Congress' 'enforcement power' under section 5 of the Fourteenth Amendment. Consequently, there has been no implied repeal of the immunity otherwise enjoyed by the States."); *Farkas v. New York State Dept. of Health*, 554 F. Supp. 24, 27-28 (N.D.N.Y. 1982) ("This Court finds that the ADEA [Age Discrimination in Employment Act] was enacted pursuant to the Commerce Clause of the Constitution and not the Fourteenth Amendment.... [T]he eleventh amendment precludes an award of back pay against a state for violation of the provisions of that Act."); *Bailey v. Ohio State University*, 487 F. Supp. 601, 606 (S.D. Ohio 1980) ("Congress did not enact 28 U.S.C. §1331 pursuant to §5 of the Fourteenth Amendment, and a federal court has no similar power to abrogate eleventh amendment immunity..."). *Contra*, *McVey Trucking, Inc. v. Secretary of State of Illinois*, 812 F.2d 311, 314-23 (7th Cir.), *cert. denied*, 108 S. Ct. 227 (1987) (article I bankruptcy clause); *Peel v. Florida Dept. of Transportation*, 600 F.2d 1070, 1074-82 (5th Cir. 1979) (article I war power clause); *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1283-86 (9th Cir. 1979) (article I copyright and patent clause).

D. *This Court Has Consistently Held That State Consent is Required Under Article I Enactments To Limit Eleventh Amendment Protection*

Consistent with the contention of *amici* presented above that Congress does not possess the power to unilaterally abrogate eleventh amendment protection under article I of the Constitution, this Court has required the element of state consent in each case in which it considered limitations on the eleventh amendment created by the operation of statutes outside the sphere of the fourteenth amendment. Specifically, this Court has indicated that limitations on eleventh amendment immunity may be found in these cases only if Congress has acted *in these statutes* to induce states to waive their immunity by their participation in certain activities regulated under the statutes. The participation by the states in these activities might then be interpreted as constituting an implied waiver of the eleventh amendment if the participation is voluntary with full knowledge of the consequences. *See Edelman v. Jordan*, 415 U.S. 651, 672 (1974).

The theory of implied waiver was first announced by this Court in *Parden v. Terminal R.R. Co.*, 377 U.S. 184 (1964), which concerned a statute enacted pursuant to the commerce clause.[10] Of course, a state does not impliedly waive its immunity simply by operating in a federally regulated sphere. Congress must first express itself in "clear language" if it wishes to condition a state's participation in an activity subject to federal regulation "on the forfeiture of immunity from suit in a federal forum." *Employees*, 411 U.S. at 285.[11] Only after such clear expression by Congress

[10] This Court in *Welch*, 107 S. Ct. at 2948, overruled *Parden* to the extent that it was "inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language. . . ." *Parden* continues to stand for the proposition that, under certain circumstances, Congress may condition state activities upon waiver of eleventh amendment protections, even though *Welch* considered the specific statute in *Parden* insufficient with respect to the "clear language" standard. *Id.*

[11] *Amici* of course contend that the Superfund Act, the subject of this review, does not present "clear language". *See* n. 1, *supra*.

may it then be determined whether the extent of the state's participation in that activity constitutes an implied waiver of the eleventh amendment.[12]

Congress' attempts to affect the constitutional protections of the eleventh amendment under the spending clause, U.S. Const., art. I, § 8, cl. 1, have also been considered by this Court. Again, waiver by the states was regarded as a critical element in determining whether eleventh amendment protections remained available to the states under statutes enacted pursuant to the spending clause. "The legitimacy of Congress' power to [abrogate the eleventh amendment]...under the spending power...rests on whether the State voluntarily and knowingly accepts [those]...terms." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (*Pennhurst I*). The "analysis relevant to Spending Clause enactments," assuming the "clear language" test is met, therefore focuses on whether a state by its participation in a program authorized by Congress has in effect consented to the abrogation of eleventh amendment immunity. *Atascadero*, 473 U.S. at 246-7, n. 5.

The distinction established by this Court between abrogation under article I and the fourteenth amendment is therefore based upon the requirement under article I for some cognizant waiver of eleventh amendment immunity by a state's action. The court of appeals attempts to wipe out this requirement and by

[12] The state activity at issue in *Parden* was operation of a railroad for profit, an activity outside the scope of normal governmental function. 377 U.S. at 195. In contrast, the activity in the case before this court was a dredge and fill operation undertaken by Pennsylvania in the Brodhead Creek to alleviate flooding which had occurred in the area. In light of this Court's reluctance to find forfeiture of eleventh amendment immunity, a state's involvement in providing an essential service for the public welfare should never be construed as providing the requisite consent to waiver of the eleventh amendment. "To suggest that the State had the choice of either ceasing operation of these vital public services or ['consenting'] to federal suit suffices... to demonstrate that the State had no true choice at all...." *Employees*, 411 U.S. at 296 (Marshall, J., concurring).

doing so destroys the fundamental protections afforded to the states by the eleventh amendment.[13]

CONCLUSION

With the exception of certain post-eleventh amendment constitutional revisions, the states, in ratifying the Constitution and subsequently the eleventh amendment, did not intend to retain anything less than absolute immunity from all suits by private citizens in federal court. "The principal that the jurisdiction of the federal courts is limited by the sovereign immunity of the States' is, without question, a reflection of concern for the sovereignty of the States . . . .' " *Atascadero*, 473 U.S. at 238-9, n. 2 (citation omitted). The history of this immunity, as recited by the founding fathers of this nation and reflected in the opinions and holdings of this Court, leads inexorably to the conclusion that the federal courts have no jurisdiction in the matter before this Court and that Congress does not possess the power to grant such jurisdiction over this suit.[14] For these reasons and on the basis of all the arguments set forth above, this Court should reverse the decision of the court below.

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[13] The relevant activities of the Commonwealth of Pennsylvania in this case were completed several years before the enactment of the applicable portion of the Superfund Act. No action on the part of the Commonwealth could be construed so as to constitute implied consent or a knowing waiver of its eleventh amendment immunity. *See* Petitioner's Brief. In view of significant Supreme Court precedent, it can only be concluded that such forfeiture of immunity may never be implied retroactively prior to enactment of the statute which attempts the forfeiture. *See Pennhurst I*, 451 U.S. at 17.

[14] Respondent Union Gas Company is not without a remedy in this matter. This type of litigation for monetary damages is exactly the type which the Framers determined long ago is more appropriately handled by the state courts. The eleventh amendment was designed to preserve federalism and to protect states from unwarranted intrusions by federal courts into state treasuries. Only the states themselves should decide such matters. *Pennhurst II*, 465 U.S. at 99.

Dated: New York, New York
May 26, 1988

Respectfully submitted,

Attorneys for Amici Curiae

ROBERT ABRAMS
Attorney General of the State of New York
O. PETER SHERWOOD
Solicitor General
ELAINE GAIL SUCHMAN*
Assistant Attorney General
Environmental Protection Bureau
120 Broadway
New York, New York 10271
(212) 341-2458

**Counsel of Record*

[Other Counsel Listed on Inside of Front Cover]